SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 471

HYMAN ABRAMS,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Hyman Abrams petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered on June 3, 1970.

Opinion Below

The opinion of the Court of Appeals (App. A., pp. A1-A10, *infra*) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 3, 1970. On July 9, 1970, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including July 31, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the rights of a defendant under the Fifth Amendment are violated when the defendant, who did not testify, is forced to object in the presence of the jury to the prosecution's demand that he produce his personal files.

2. Whether there can be a conviction under 18 U.S.C. 1505 for attempting to influence or impede a witness in an administrative proceeding when there is no evidence that the defendant's action was intended to obstruct, influence or impede the pending proceeding.

Statute Involved

18 U.S.C. 1505 is set forth in Appendix B.

Statement

Petitioner, an attorney who specialized in immigration law, was convicted after a jury trial in the United States

District Court for the Southern District of New York on two counts of aiding and abetting in the submission of false statements to the Immigration and Naturalization Service (INS) (18 U.S.C. 1001), on one count of obstructing the administrative process (18 U.S.C. 1505), and two misdemeanor counts of causing aliens not to be in possession of alien registration certificates (8 U.S.C. 1304(e)). The jury acquitted appellant on 27 other counts.

Each of the charges of which petitioner was convicted related to his practice as an immigration lawyer. The two counts charging aiding and abetting false statements were based on the testimony of two Jamaican aliens, that petitioner was aware at the time he submitted applications to INS on their behalf that certain statements in those applications relating, in one case, to lack of present employment and, in the other, to intent to depart from the United States were false. The two misdemeanor counts involved the question of whether it was proper for petitioner to retain in his possession the alien registration certificates of two aliens whom he represented.

The charge that petitioner attempted to obstruct an administrative proceeding arose from the fact that one of his clients, a Mrs. Downer, who was being questioned by INS officials in connection with her application for voluntary departure, lied in stating that her deceased employer was still alive. When the INS officials told Mrs. Downer that they knew her employer was dead, she admitted that she had lied but claimed that petitioner had told her to do so. The allegation that petitioner attempted to obstruct the proceeding relating to Mrs. Downer's application for

voluntary departure was based on Mrs. Downer's testimony that after this incident at the INS office, she told petitioner what had happened and he asked her to sign a statement that he had not known that her employer was dead.

Petitioner exercised his rights under the Fifth Amendment and did not testify at trial. The principal defense witness was petitioner's wife, who was also his secretary and assistant. She had been present at petitioner's meetings with the aliens who testified against him and she testified that the aliens had not disclosed to petitioner the true facts with reference to their status, but rather, the aliens had lied to petitioner as they lied to INS.

During the cross-examination of Mrs. Abrams, the prosecutor, in front of the jury, called for the production the following day of the personal files of the petitioner relating to various matters about which she had testified. The files which the prosecutor demanded had previously been seized by INS investigators but had been suppressed prior to trial on the ground that they were the personal files of the defendant and, thus, protected under the Fifth Amendment.

At the opening of the trial the next morning, petitioner's counsel, who then had with him the files which had been demanded, asked for a conference in the robing room, where he asserted his client's constitutional rights in the files. Government counsel then requested that petitioner be forced to object in the presence of the jury. The prosecutor admitted that he wanted the objection to be made in open court to avoid "an inference adverse to the Government from the failure of the Government to produce anything of an incriminating nature from the files" and so as to create "the possibility that they (the jury) will

draw the inference adverse to the defendant." (Joint Appendix A268-269.)*

Although the Court recognized that the files in question were constitutionally protected and despite the clear statement of the prosecutor's impermissible intent to draw an adverse inference from the defendant's assertion of his Fifth Amendment rights, the trial judge required defense counsel to object in open court, over defense counsel's objection to that procedure. After the objection, the trial judge gave an instruction that "I ruled as a matter of law that these files need not be produced. The jury is to draw no inference from that, one way or the other.".

Reasons for Granting the Writ

I

The Defendant's Fifth Amendment Rights Were Violated When He Was Forced to Object in the Jury's Presence to the Prosecutor's Demand for Production of His Personal Records.

In recent years, this Court has established that the Fifth Amendment does more than simply prevent the Government from compelling the defendant to testify at trial. Thus, in *Griffin* v. *California*, 380 U. S. 609, the Court held that the Fifth Amendment also prohibits the prosecutor or the court from commenting on the accused's failure to testify at trial. *Stewart* v. *United States*, 366 U. S. 1, makes clear that the Fifth Amendment is similarly violated when the prosecution attempts to have the jury draw an adverse

* References are to the Joint Appendix filed in the Court below, a copy of which has been lodged with the Clerk.

inference from a defendant's failure to testify at a prior trial.

The instant case raises a closely analogous issue concerning the scope of the Fifth Amendment's protection, which has not previously been considered by this Court. Here the prosecutor sought to have the jury draw an "inference adverse to the defendant" from the defendant's assertion of his right under the Fifth Amendment not to be compelled to produce his private papers for use by the Government. See *Boyd* v. *United States*, 116 U. S. 616.

Despite the close analogy of the situation here to that presented in *Griffin* and *Stewart*, the court below ruled that the question presented was "not one of constitutional dimensions" (A4). In reaching this conclusion the court relied on *Namet* v. *United States*, 373 U. S. 179, which involved the drawing of an adverse inference from the assertion of the privilege by a witness. Here, however, the question arose during the testimony of a witness, but the privilege being asserted was that of the defendant himself. The fact that the court below held that in these circumstances a constitutional issue was not raised, dramatizes the need for this Court to speak on this issue.

The decision here can not be supported on the reasoning of the court below that petitioner was not prejudiced by this incident.* In the first place, the case was an ex-

*The court below treated the issue as if the only inference the jury might have drawn was that petitioner had asserted his Fifth Amendment rights on some prior occasion. The fact is, however, that the objection that petitioner was forced to make in the presence of the jury was founded on his Fifth Amendment rights. The jury may well have drawn an adverse inference from the defendant's objection during the trial to a demand that he produce relevant documents.

tremely close one in which the defense had presented testimony which, if believed, would have established petitioner's innocence. Second, the suggestion of the court below that any error was cured by the trial court's instruction to the jury to draw no inference from this incident is directly contrary to this Court's decision in *Stewart* v. *United States*, *supra*. See also, *Bruton* v. *United States*, 391 U. S. 123. Finally, the Court should not overlook the fact that the prosecutor insisted that the defendant be made to assert his claim in the presence of the jury "so the possibility that they will draw the inference adverse to the defendant would be appropriate to protect the Government from the jury drawing an inference adverse to the Government." (Joint Appendix, pp. 268-269.)

II

The Government Failed to Prove That Petitioner Attempted to Influence or Impede a Pending Administrative Proceeding.

Petitioner was convicted of corruptly endeavoring to influence a witness, Mrs. Downer, in a proceeding before the Immigration and Naturalization Service, to wit, the hearing concerning her application for voluntary departure. There was no evidence, however, that petitioner intended to influence or impede Mrs. Downer as a witness in that proceeding.

As is detailed in the Statement, when the INS investigator caught Mrs. Downer lying about the fact that her employer was dead, while interviewing her in connection

with her application for voluntary departure, she said that petitioner had told her to lie. Thereafter, when she told petitioner what had occurred at INS, petitioner allegedly attempted to have her sign a statement that he had not known her employer was dead. The record is devoid of proof that petitioner was attempting to influence Mrs. Downer as a "witness" in the voluntary departure proceedings. The only possible inference was that petitioner was attempting to protect himself, with respect to possible future investigations that could have no bearing on Mrs. Downer's application for voluntary departure.

In affirming petitioner's conviction, absent any proof that petitioner had attempted to influence Mrs. Downer as a witness in the voluntary departure proceeding, the court below has construed 18 U.S.C. 1505 (obstruction of an administrative proceeding) in a manner which conflicts with the decisions in the Eighth and Tenth Circuits construing the companion provision of 18 U.S.C. 1503 (obstruction of justice). *Ferina* v. *United States*, 302 F. 2d 95, 102 (C.A. 8, 1962), *cert. denied*, 371 U. S. 809; *Cotton* v. *United States*, 409 F. 2d 1049 (C.A. 10, 1969). In *Ferina*, which involved an assault on a witness, the Eighth Circuit set forth the elements necessary to establish the crime of obstruction of justice as follows:

> "In order for an assault to have constituted an offense under that section it must have been made with knowledge on the part of the assailants of Sheetz' past conduct or expected conduct in connection with the federal narcotics charge then pending against Biase and either for the purpose of punishing him for his past conduct in relation thereto or intimidating him

in connection with his expected conduct in relation thereto."

Ferina thus makes clear that in order to sustain an obstruction conviction the evidence must show more than that the alleged victim was a witness, in some proceeding; it must establish that the defendant's action was designed to influence the victim's conduct as a witness or to punish the victim for having acted as a witness. See also *Pettibone v. United States*, 148 U. S. 197; *Taran v. United States*, 266 F. 2d 561 (C.A. 8, 1959). Here there was proof that Mrs. Downer was a witness in the voluntary departure proceeding, but no proof that petitioner attempted to influence her as a witness in that proceeding.

Since there is no rational basis for distinguishing between the obstruction of an administrative proceeding statute and the obstruction of justice statute with regard to the element of intent, there is now a conflict among the circuits which should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 742—September Term, 1969.

(Argued April 30, 1970 Decided June 3, 1970.)

Docket No. 34090

UNITED STATES OF AMERICA,

Appellee,

v.

HYMAN ABRAMS,

Appellant.

Before:

HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Edward C. McLean, *Judge*, upon a jury verdict finding appellant guilty on two counts of causing false statements to be made to the Immigration and Naturalization Service (INS), in violation of 18 U.S.C. §1001 (1964), and 18 U.S.C. §2 (1964), on one count of endeavoring to influence a witness in a proceeding before the INS, in vio-

lation of 18 U.S.C. §1505 (1964), and on two counts of causing an alien to fail to carry and have in his personal possession a certificate of alien registration, in violation of 8 U.S.C. §1304(e) (1964) and 18 U.S.C. §2 (1964).

Affirmed.

SHELDON H. ELSEN, New York, N. Y. (Orans, Elsen & Polstein, Mortimer Todel, Lewis Shapiro and John S. Martin, Jr., of counsel), *for Appellant.*

JACK KAPLAN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Maurice M. McDermott and John H. Gross, Assistant United States Attorneys, of counsel), *for Appellee.*

JACK WASSERMAN, Washington, D. C., Association of Immigration and Nationality Lawyers, submitted a brief *amicus curiae.*

HAYS, *Circuit Judge*:

Appellant, an attorney specializing in immigration law, appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York upon a jury's verdict finding him guilty on two counts of causing false statements to be made to the Immigration and Naturalization Service (INS), in violation of 18 U.S.C. §1001 (1964) and 18 U.S.C. §2 (1964), on one count of endeavoring to influence a witness in a proceeding before the INS, in violation of 18 U.S.C. §1505 (1964), and on two counts of causing an alien to fail to carry and have in his personal possession a certificate of alien regis-

tration, in violation of 8 U.S.C. §1304(e) (1964) and 18 U.S.C. §2 (1964).[1]

In urging the reversal of his conviction appellant contends: (1) that the exercise of his privilege against self incrimination was improperly called to the attention of the jury, in violation of his rights under the Fourth and Fifth Amendments; (2) that the cross-examination of Leon Rosen, an attorney who testified as a defense expert on immigration matters, improperly conveyed to the jury the impression that the witness and the appellant were associated with other lawyers charged with immigration frauds; (3) that the trial court's charge on the count of endeavoring to influence a witness in a proceeding before a government agency constituted plain error, and that in any event it was error to submit this count to the jury; (4) that the trial court committed plain error in failing to charge that appellant's clients who testified for the prosecution were accomplices whose testimony should be scrutinized with special care; (5) that there was insufficient evidence to support appellant's conviction as to one of the counts of causing false statements to be made; and (6) that his conviction on two counts of causing an alien to fail to have personal possession of his certificate of alien registration violated the requirements of due process.

We find no merit in appellant's contentions and accordingly affirm the judgment of conviction.

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1. Appellant was originally indicted on 60 counts, charging various offenses in connection with his practice of immigration law. Twenty-eight of these counts were severed prior to trial. Appellant was acquitted on twenty-seven counts.

Appellant was sentenced to a term of one year's imprisonment on each of the two counts charging a violation of 18 U.S.C. §1001 and 18 U.S.C. §2 and on the count charging a violation of 18 U.S.C. §1505. A term of one month's imprisonment was imposed on each of the two misdemeanor counts charging a violation of 8 U.S.C. §1304(e) and 18 U.S.C. §2. The sentences run concurrently.

I.

Appellant's claim that the exercise of his privilege against self incrimination was improperly brought to the attention of the jury is based upon the following incident. The prosecution, during cross-examination of appellant's wife, who was also his secretary, called upon her to produce certain files, which had been suppressed on appellant's motion prior to trial. Appellant's counsel waited until the following morning to interpose an objection outside the hearing of the jury. The trial judge sustained the objection, but ruled that as a matter of fairness to the government, the objection should be repeated in the presence of the jury. Appellant claims that by thus forcing to the attention of the jury the exercise of his privilege against self incrimination, his constitutional rights were violated.

The problem appellant raises is not one of constitutional dimensions. The privilege against self incrimination is not a prohibition against all inquiry. See 8 Wigmore on Evidence §2268, at 402 (McNaughton rev. 1961). Specific instances of prosecutorial misconduct in the face of knowledge that the privilege will be asserted or of the creation of inferences adding critical weight to the prosecution's case may be so prejudicial as to require reversal. See *Namet v. United States*, 373 U. S. 179, 185-90 (1963). That, however, is not the case here. We do not believe the prosecution's request for the files evidenced a deliberate attempt to call to the attention of the jury appellant's prior exercise of his privilege against self incrimination. The prosecution had some basis for believing it was now entitled to inspect the files; appellant's wife admitted that she had studied the files in preparation for her testimony.

In any event, the prosecution's conduct, if improper, represented only a "minor lapse" in the context of the entire trial. See *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), cert. denied, 340 U. S. 948 (1951). Nor do we believe the jury could have drawn any inferences from the incident of critical importance to the prosecution's case. In calling for the files, the prosecution made no reference to the fact that appellant had previously exercised his privilege against self-incrimination with regard to them. The court required appellant's counsel to make only a general non-specific objection to the production of the files, and accordingly counsel merely objected to the production of the files "at this particular time." This was not a case where the jury was certain to infer that appellant had previously exercised his privilege against self incrimination. See *United States* v. *Gross*, 276 F.2d 816, 820-21 (2d Cir.), cert. denied, 363 U. S. 831 (1960); *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964). Even assuming the jury might have drawn an inference prejudicial to appellant, not only did appellant's counsel help create the situation by failing to make timely objection to a line of questioning obviously pointed towards a request for the files, see *United States* v. *Five Cases, etc.*, 179 F.2d 519, 523-24 (2d Cir.), cert. denied, 339 U. S. 963 (1950), but the court's careful instruction to the jury, upon sustaining the objection, that the files need not be produced "as a matter of law" and that the jury was to "draw no inferences from that one way or another," was sufficient to cure any prejudice inherent in the situation. See *United States* v. *Namet*, *supra*, at 187.

II.

The prosecution's examination of Leon Rosen, appellant's expert witness, did not exceed the permissible scope of cross-examination. Cross-examination elicited no more than that the witness was friendly with appellant and that he had previously testified as a defense expert in two similar cases. The witness' friendship with appellant and his testifying as a defense witness in two similar cases were both relevant on the issue of bias. The trial judge did not abuse his discretion in permitting this line of inquiry. See *United States* v. *Lester*, 248 F.2d 329, 334 (2d Cir. 1957); 3 Wigmore on Evidence §949 (3d ed. 1940).

III.

Count 5 charged that appellant corruptly endeavored to influence Lilleth Downer, a witness in a proceeding before the INS. Mrs. Downer testified at the trial that her employer, a Mrs. Gittelman, had died and that appellant told her not to divulge Mrs. Gittelman's death to the INS but to claim that she was still working for her. When she sought to carry out appellant's instructions she found that the INS investigator was aware of Mrs. Gittelman's death. Upon being taxed with lying Mrs. Downer told the investigator the whole story including Abrams' role. When later she reported to Abrams what had happened he tried to persuade her to go to the INS and recant her statement to the investigator.

Although appellant did not object to the charge given on Count 5, he now claims that it was so prejudicially erroneous as to constitute plain error cognizable under

Rule 52(b), Fed. R. Crim. P. The crux of appellant's argument is that the jury, by its acquittal on Count 4 which charged appellant with advising Mrs. Downer to lie to the INS about her employer's death, indicated that it convicted appellant on Count 5 even though it found that appellant had sought only to obtain a statement from Mrs. Downer of what had happened. This, appellant concludes, shows that the court's charge did not sufficiently apprise the jury of what it had to find in order to convict on Count 5 and that the error sufficiently influenced the verdict as to constitute plain error.

Appellant's argument is untenable. The acquittal on the related count shows no more than a possible inconsistency in the jury's verdict and cannot be used to undermine the correctness of a conviction on another count. See *Dunn* v. *United States*, 284 U. S. 390, 393 (1932); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), cert. denied, 389 U. S. 914 (1967); *United States* v. *Kahn*, 366 F.2d 259, 262 (2d Cir.), cert. denied, 385 U. S. 948 (1966).

The trial court's charge, which included an instruction to the effect that appellant must be found, beyond a reasonable doubt, to have acted "corruptly," defined as "with improper motive, a bad and evil purpose," was adequate to apprise the jury that appellant could not be convicted for attempting to obtain what he believed to be a true statement. There is no basis for a finding of reversible error. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

Appellant contends that in any event it was error to submit Count 5 to the jury, since there was no evidence that he intended to influence an agency proceeding. The offense under 18 U.S.C. §1505 (1964) is to influence a wit-

ness, not necessarily to directly influence the proceeding itself, and there was sufficient evidence to convict appellant on this charge. Nor do we think there can be any doubt that an application for voluntary departure is a "proceeding" within the intent of 18 U.S.C. §1505 (1964).

IV.

Although appellant did not request a special instruction on accomplice testimony, he now claims that the failure to give such a charge also constituted plain error. It is preferable to charge the jury that accomplice testimony should be scrutinized with special care and caution. However this circuit does not require that the charge be given unless substantial prejudice results from its omission. See *United States* v. *Cianchetti*, 315 F.2d 584, 592 (2d Cir. 1963). The trial judge gave the usual instruction concerning the weight to be given to the testimony of witnesses as affected by their bias or interest in the case, and under the circumstances of this case, the omission of the special instruction on accomplice testimony does not justify reversal.

V.

There was sufficient evidence to convict appellant on the count charging that he had caused the making of a false statement in an affidavit relating to an application for an extension of stay. The affidavit, purportedly made by a client's son, stated that the client intended to depart the United States on a scheduled date and had made plans for such departure. Although appellant may not have been

specifically aware of what his client's plans for departure were, the jury could have found from the evidence that appellant acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth. See *United States* v. *Simon*, slip op. p. 3817, 3840-43 (2d Cir. Nov. 12, 1969), cert. denied, —— U. S. —— (1970); *Bentel* v. *United States*, 13 F.2d 327, 329 (2d Cir.), cert. denied sub nom. *Amos* v. *United States*, 273 U. S. 713 (1926).

VI.

Finally, appellant contends that his conviction for causing an alien to fail to have personal possession of his certificate of alien registration rests upon an unconstitutionally vague application of the statute requiring possession, 8 U.S.C. §1304(e) (1964). He claims that since the INS required the certificate, here the I-94 form, to be submitted with various applications made by an attorney on behalf of his client and since the INS invariably returned the I-94 to the attorney rather than to his client, he has been convicted for what the government, by its actions, gave him reason to believe was entirely proper. We cannot agree. Appellant kept the I-94's in question for over a period of three years. No legitimate reason justified their retention over this prolonged period. Appellant was on notice that such retention was illegal. In fact he was specifically instructed by an agent of the INS to return the forms to his clients. Under the circumstances, we believe appellant was made sufficiently aware of the illegality of his conduct so as to preclude any claim that his conviction on these counts represented a denial of due process.

Furthermore, the I-94 form is clearly a "certificate of alien registration" within the meaning of 8 U.S.C. §1304(e) (1964). The I-94 was properly designated as an alien registration form in 8 C.F.R. 264.1(b) (1969), pursuant to statutory authority contained in 8 U.S.C. §1304(d) (1964). *Amicus* claims to the contrary are rejected.

The judgment of conviction is affirmed.

Appendix B

§1505. Obstructions of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or

investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770; Sept. 19, 1962, Pub.L. 87-664, §6(a), 76 Stat. 551.